

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION

BRENDON TAYLOR, et al., : CASE NO. 1:24-cv-0204  
:  
Plaintiffs, :  
vs. : **ORAL ARGUMENT**  
:  
JESSE LEE ANTHONY HOOVEN, et : 26th of August, 2024  
al., : 10:44 a.m.  
:  
Defendants.

**TRANSCRIPT OF PROCEEDINGS**  
**BEFORE THE HONORABLE SUSAN J. DLOTT, JUDGE**

APPEARANCES:

For the Plaintiffs:

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For the Defendant, The City of Cincinnati:

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City of Cincinnati, Law Division  
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For the Defendants, The Hamilton County Board of County  
Commissioners and The Hamilton County Department of Jobs and  
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United States District Court  
100 East Fifth Street  
Cincinnati, Ohio 45202

PROCEEDINGS

(Proceedings held in open court at 10:44 a.m.)

THE DEPUTY: All rise. This court is now in session pursuant to the recess, The Honorable Judge Susan J. Dlott presiding. Please be seated. United States -- or *Brendon Taylor versus Jesse Lee Anthony Hooven, et al*, Case No. 24-cv-204.

THE COURT: Good morning to everyone. Let me ask counsel to enter their appearances, and we'll start with Mr. Whittaker.

MR. WHITTAKER: Yes. Good morning, Your Honor. Justin Whittaker for the plaintiffs, Holly Hooven and Brendon Taylor.

THE COURT: Thank you.

City of Cincinnati, who's sitting at which table?

MR. PAUL: Good morning, Your Honor. Shuva Paul for the City of Cincinnati here.

THE COURT: I'm sorry, what is your name?

MR. PAUL: Shuva Paul. "Paul" is the last name.

THE COURT: Oh, it's your last name?

MR. PAUL: Yeah, yeah.

THE COURT: Okay. What's your first name?

MR. PAUL: Shuva.

THE COURT: Oh, okay. All right. I have got it backwards here on this.

1 THE DEPUTY: I have it backwards.

2 MR. PAUL: Wouldn't be the first time. If I had a  
3 nickel for every time.

4 THE COURT: How long have you been with the City?

5 MR. PAUL: Since 2012.

6 THE COURT: Surprised I've never seen you before.

7 Ms. Baron?

8 MS. BARON: Yes, Your Honor, for the City.

9 THE COURT: Good morning.

10 MS. BARON: Good morning.

11 MR. FRIEDMANN: Michael Friedmann for Hamilton  
12 County.

13 MS. FISCHER: Kathleen Fischer for Hamilton County.

14 THE COURT: Okay. We have the second generation of  
15 Friedmanns here too. I know I've been on the bench too long  
16 when I'm getting people's kids.

17 All right. We're here today in *Brendon Taylor versus*  
18 *Jesse Lee Anthony Hooven*, and, first, I want to take care of  
19 some preliminary things. Plaintiffs have moved the clerk  
20 for -- clerk of court for an entry of default. Officer  
21 Hooven's attorney, let's see, his attorney entered -- his  
22 attorney entered an appearance and he's moved for dismissal  
23 of insufficient service of process.

24 MR. WHITTAKER: Yes, Your Honor. They moved for  
25 dismissal after the clerk calculated their answer time for

1 August 22nd, and then the motion itself, however, doesn't  
2 actually address the service date. So we have a couple of  
3 weeks to respond, but we're going to respond this week. I  
4 would expect that they would withdraw the motion once  
5 they've maybe looked at the docket, but we're going to  
6 respond this week to that motion.

7 THE COURT: Who filed that, Mr. Gottesman?

8 MR. WHITTAKER: Mr. Gottesman.

9 THE COURT: All right. We're not going to play  
10 Mickey Mouse here. Let's see. Officer Hooven works for the  
11 City. I want you to order him to your office to be served.  
12 How are you going to do this?

13 MR. WHITTAKER: Judge, I think the clerk has  
14 already found that he has been served, but --

15 THE COURT: But there's a difference of opinion  
16 about it. We're not doing these Mickey Mouse things. He's  
17 going to get his ass served. Pardon me. This angers me.

18 MR. WHITTAKER: I think because his counsel have  
19 appeared, I can do Rule 5 by filing a notice in the record  
20 of service of the complaint. I think that's the only way I  
21 can.

22 THE COURT: No. He is an employee of the City. He  
23 can make himself available to be served. I guess you do  
24 personal service.

25 MR. WHITTAKER: I'm happy to serve him however is

1 the most convenient for the City.

2 THE COURT: All right.

3 MR. PAUL: If I may, I understand that they're not  
4 accepting service on his behalf.

5 THE COURT: No, they don't have to accept service.  
6 I want them to order him to be at the solicitor's office and  
7 he can get served there.

8 MR. PAUL: With the understanding that the City has  
9 made it clear that they are not representing Officer Hooven.

10 THE COURT: No, no, I understand that, but you are  
11 his boss.

12 MR. PAUL: Okay.

13 THE COURT: You can order him. So you and Mr.  
14 Whittaker work out arrangements for when this can be done in  
15 the next week.

16 MR. WHITTAKER: I'm available at the City's  
17 convenience to do that, Your Honor.

18 MR. PAUL: We'll consult.

19 THE COURT: This is outrageous that a police  
20 officer is avoiding service. I'm really offended.

21 MR. PAUL: I don't disagree, Your Honor. I will  
22 say, Your Honor, when police officers act in the scope of  
23 their duties and they're acting, then, certainly, we do  
24 everything we can to facilitate that. And, in fact, we, you  
25 know, take seriously the idea of not serving an officer at

1 any other place, like their residence, but we don't accept  
2 service on behalf of people who have personal matters, so  
3 that's why this has probably come out like this. It's not  
4 on --

5 THE COURT: It's not your fault. It is the  
6 officer's fault. And I want to cure that without a whole  
7 bunch of pleadings back and forth; that is not necessary,  
8 that offends me. He works for the City. You order him to  
9 be at the solicitor's office so Mr. Whittaker can serve him  
10 at a time that works out with you all in the next week.

11 MR. PAUL: Okay. City appreciates the  
12 clarification, Your Honor.

13 MR. WHITTAKER: Just to clarify for the record, the  
14 plaintiffs aren't suggesting that the City has done  
15 anything, or should be doing anything differently, to assist  
16 with that.

17 THE COURT: I understand this completely. He's  
18 dodging service.

19 MR. WHITTAKER: Thank you, Your Honor.

20 THE COURT: He's making it difficult. He and Mr.  
21 Gottesman are apparently making it difficult to get him  
22 served. You know, we're not -- pardon me, but we're not in  
23 state court, we are in federal court, and I don't put up  
24 with this kind of stuff. Okay, we solved that problem.

25 MR. WHITTAKER: Thank you, Your Honor.

1           THE COURT:   Okay.  Oh, Mr. Whittaker, have you  
2           requested and obtained the memorandum of understanding  
3           that's been mentioned in discovery?

4           MR. WHITTAKER:  I have not asked for it, but I've  
5           gotten a copy of it independently of having to ask for it.

6           THE COURT:  So you have it?

7           MR. WHITTAKER:  As far as I know, I have it, but I  
8           assume once we get into discovery, that will be produced.

9           THE COURT:  Well, that's sort of a critical thing  
10          with this motion.  So, you know, I need to know that you are  
11          aware of what it says, because I think that because of  
12          what's been pleaded -- is it in the counterclaim, Peggy,  
13          cross-claim, counterclaim?

14          MS. FECHTEL:  The memorandum of understanding was  
15          brought up by Ms. Paul in her cross-claim.

16          THE COURT:  Yeah, yeah.  And because of that,  
17          because of the suggestion in her cross-claim, I think you  
18          may want to -- you may want leave to amend the complaint.

19          MR. WHITTAKER:  That's what I was going to ask for  
20          today, Your Honor.  I think that might cure everybody's  
21          concerns.  If I had had knowledge of the memorandum of  
22          understanding before filing the response, I absolutely would  
23          have asked to amend, but perhaps that was an error,  
24          strategic error, on my part, but I just wanted to get in  
25          front of the Court however I could.  If an amendment will

1       cure that --

2               THE COURT:   Yeah, I will give you leave to amend,  
3       and I would like the City to immediately send a copy of this  
4       memo over to Mr. Whittaker so that he has an official  
5       version.

6               MR. PAUL:   May I address the relevance of the MOU,  
7       Your Honor?

8               THE COURT:   Sure.

9               MR. PAUL:   You know, so in this instance, even if  
10       he were to have the MOU, it's not relevant because of the  
11       sole purpose of Jesse Hooven's actions were to gain -- this  
12       is drawing on the complaint -- to gain dirt on his ex-wife's  
13       fiance for leverage in their private child custody dispute.  
14       So the City asks really:   What is more personal than a  
15       divorce and an accompanying child custody dispute?   The MOU  
16       would be, if it was between City and county for  
17       government-related purposes.   And the plaintiffs, it's the  
18       plaintiffs themselves, who allege that Officer Hooven made  
19       it clear and that Madison Paul understood it, this has  
20       nothing to do with any City investigation, no law  
21       enforcement investigation.

22               And so this is not like, for example, the *Stengel* case,  
23       which the City cited in the brief.   That's the 50-year-old  
24       case where the officer, an off-duty officer, intervened in a  
25       physical altercation in a bar.   And the Court ruled, well,



1       you know, had he not intervened, he would have been  
2       subjected to discipline because he stepped up pursuant to a  
3       department regulation and then he overstepped his bounds by,  
4       you know, exceeding that.

5               But here, there is no, there is no -- he would not --  
6       would Officer Hooven have been disciplined had he not asked  
7       or allegedly asked for this information? No, because there  
8       was no City investigation concerning Mr. Taylor or  
9       Ms. Hooven. So it's a red herring, Your Honor.

10              The MOU, we'll certainly provide it because that's  
11       something that Mr. Whittaker could have requested at any  
12       time, but it doesn't change the fact that his claims don't  
13       make it past a prima facia stage. And I can expound on  
14       that, Your Honor.

15              THE COURT: Mr. Paul, if it makes you feel any  
16       better, I have the exact same reaction to that as you did.  
17       But my law clerk pointed out to me a Sixth Circuit case from  
18       2019, *Morris versus City of Detroit*, which states, to  
19       determine whether a person acted under the color of state  
20       law, the Sixth Circuit has explained that, quote: "The fact  
21       that a police officer is on or off duty, or in or out of  
22       uniform, is not controlling. It is the nature of the act  
23       performed, not the clothing of the actor or even the status  
24       of being on duty or off duty which determines whether the  
25       officer has acted under color of law."

1 MR. PAUL: And actually, Your Honor, we rely  
2 heavily on that case for the proposition that the claims --  
3 and we're talking about Counts 2 and 4, the municipal  
4 liability claims against the City -- can't proceed, and  
5 here's why. In that case -- this is *Morris v City of*  
6 *Detroit*. The officer in that case was on duty, wore her  
7 badge, had department-issued handcuffs, went to the  
8 plaintiff's home to collect a personal debt of \$300, got  
9 into the physical altercation, drew her department-issued  
10 firearm, fired a shot at the plaintiff missing the  
11 plaintiff. And the Court agreed that the officer did not  
12 manifest the requisite showing of state-granted authority to  
13 act under color of law.

14 So instead of a personal debt of \$300, what we have  
15 here with Officer Hooven is a personal vendetta against his  
16 ex-wife's fiance. He didn't like the fact, according to the  
17 allegations, that they were going to get married. It's the  
18 same thing, the sole purpose was to get dirt so he could use  
19 it in his child custody case. And plaintiffs have not  
20 disputed the legal analysis in *Morris*, Your Honor. That  
21 case is fatal to their claims against the City at this  
22 stage.

23 THE COURT: Okay. I think you've gotten into your  
24 argument.

25 MR. PAUL: I'm sorry.

1 THE COURT: No, that's fine, that's fine.

2 Felix, is that you in the back? No.

3 MR. HICKS: William Hicks from the City.

4 THE COURT: I thought you looked familiar.

5 MR. HICKS: Just coming to supervise.

6 THE COURT: It was my pleasure to have you in my  
7 courtroom awhile ago, you and Emily.

8 Okay. Well --

9 MR. WHITTAKER: Judge, if I might respond to that  
10 argument, if you're inclined to hear it.

11 THE COURT: Yeah, go ahead.

12 MR. WHITTAKER: We rely on the *Morris* case too.  
13 It's a summary judgment case, and all of the authorities  
14 that the City relies on and argues from are based on summary  
15 judgment, not 12(b)(6). It's inappropriate at this stage to  
16 go through the complaint with a fine-tooth comb and say this  
17 fails, this fails, this fails. The City is arguing that  
18 these things didn't happen or these things don't matter or  
19 certain aspects, just because they are alleged, that must be  
20 the entire basis for the claim, and it's not. The overall  
21 umbrella argument in the complaint is Officer Hooven  
22 accessed this system that he could not have come anywhere  
23 close to but for his status as a police officer. And the  
24 MOU roundly acknowledges that and supports that conclusion.

25 I don't think we needed the MOU in the complaint to

1 survive a motion to dismiss. The MOU solidifies that point  
2 that there was a policy that is apparently undisputed that  
3 allowed information-sharing between JFS workers and police  
4 officers. Officer Hooven took advantage of that policy that  
5 only he could access because he's a police officer, got to  
6 Ms. Paul because she's a JFS worker, evidently. Ms. Paul  
7 alleged that she was acting within the scope of her duty, of  
8 her obligations, and color of State law, and she presumably  
9 would not have shared that information with Officer Hooven  
10 but for him acting under the color of State law as a police  
11 officer himself.

12 So the cases in the Sixth Circuit say, you know, even  
13 if a police officer or public official departs from his  
14 duties, or whatever his intent, if he's abusing the  
15 authority bestowed upon him by the state, or by the City in  
16 this case -- which is exactly what we allege in the case and  
17 which exactly appears to have happened because of the MOU --  
18 then, that's acting under a color of State law or at least a  
19 strong indicia of that fact, more than sufficient enough to  
20 survive a motion to dismiss. It's possible in discovery  
21 that the claims against -- the MOU claims won't survive, but  
22 that is way -- very premature now under 12(b)(6).

23 THE COURT: Well, it's up to you if you want to  
24 amend your complaint.

25 MR. WHITTAKER: I do, Your Honor, I do.

1           THE COURT: All right. Then, I think -- you know,  
2 I'm not going to decide this today. I'm here to hear the  
3 arguments for it, and I think I've heard quite a bit  
4 already.

5           MR. PAUL: Your Honor, I don't mean to -- I don't  
6 know if you were going to go forward, Your Honor.

7           THE COURT: Yeah, I was. I intended to start that  
8 way.

9           MR. PAUL: I'll be happy to follow the Court's  
10 discretion and reserve comment.

11          THE COURT: Why don't we start over, then. I've  
12 gotten the flavor of your arguments already, but since it's  
13 the City's motion to dismiss, are you going to argue it, Mr.  
14 Paul?

15          MR. PAUL: Yes, Your Honor.

16          THE COURT: Okay. Approach the podium.

17          MR. PAUL: Good morning and may it please the  
18 Court. Your Honor, we have certainly gotten into the  
19 reasons why Plaintiffs' claims against the City should be  
20 dismissed at the pleading stage. And I'm going to -- really  
21 this case calls for a very straightforward application of  
22 this very basic principle that is really not up for dispute.  
23 It's the principle that any 1983 municipal liability claim  
24 in order to proceed -- well, actually, it warrants dismissal  
25 and cannot proceed when the alleged conduct is purely

1 private. And that's what we have here, despite Plaintiffs'  
2 speculation as to, you know, what things could be if the  
3 facts were completely different.

4 Your Honor started -- at the outset of this proceeding,  
5 Your Honor suggested that plaintiffs may want the MOU  
6 because they may want to take a look at it, you know. And I  
7 want to come back to that in a second because underlying the  
8 plaintiffs' failure is *Twombly*. You know, they're combining  
9 conclusory allegations about a policy and custom of an  
10 action -- or even the color of law argument itself, but  
11 combining it with very detailed factual allegations that are  
12 fatal to their claims.

13 And this is -- and when Mr. Whittaker talks about  
14 *Morris* being a summary judgment case, really, that's  
15 plaintiffs' only objection to that, to the applicability of  
16 that case. Plaintiffs are the master of their complaint.  
17 They are the ones who inserted such detailed allegations  
18 into their complaints and pleadings that -- what more should  
19 the Court look at? Well, if you look at our motion to  
20 dismiss, we drew all of our facts from the complaints. We  
21 didn't go outside of that.

22 THE COURT: Let me ask you a question.

23 MR. PAUL: Yes.

24 THE COURT: If he amends his complaint, then, where  
25 are you?

1 MR. PAUL: So we're still back -- this is the  
2 question, you know, can they amend the complaint to turn the  
3 purpose of Officer Hooven into something -- into other than  
4 it was? Because they're the ones who said that his sole  
5 purpose was to get dirt on his ex-wife's fiance, right? So,  
6 remember, in -- you know, if there had been a department  
7 policy where he needed to act according to it and then  
8 overstepped the bounds, well, then, you might -- then, there  
9 might be implicating 1983. Of course, once you get there,  
10 you still have to show that the City was a moving force  
11 behind it, right?

12 So I'm really focussing on color of law here, Your  
13 Honor, because that's the most straightforward path of  
14 dismissal. We're not conceding constitutional violation,  
15 not conceding that there's a moving force. The plaintiffs  
16 have alleged only in a very conclusory way that there's  
17 some -- that the act of Officer Hooven could be even fairly  
18 attributed to the City.

19 Deliberate indifference, you know, it's the opposite of  
20 deliberate indifference when the City looks at whether  
21 Officer Hooven used the City's law enforcement database.  
22 And so they looked back a year and said, all right, no,  
23 there's been no use of this, that was so -- so the  
24 plaintiffs allege that, they say that, yeah. I mean, the  
25 complaint is so detailed as to Officer Hooven making it

1 clear that he's not doing anything related to a City  
2 investigation and that Madison Paul -- the person he was  
3 dating during the time of this complaint of conduct -- knew  
4 that. She in her -- you know, and they've alleged that she  
5 did it as a personal favor.

6 So when plaintiffs say that but for the authority of  
7 his office, you know, it would not have been -- the conduct  
8 would not have occurred or the defendant would not have gone  
9 into the system, well, that's not true because they're the  
10 ones alleging that you have a personal relationship between  
11 the two defendants for whatever amount of time there was.  
12 He made it clear I can't -- there's no City investigation  
13 here. She is not relying on that because she's saying,  
14 yeah, I knew that. Those are the plaintiffs' allegations.

15 So take the MOU and look at it and where does it get  
16 you, Your Honor? It still gets you where the officer is  
17 going completely rogue on a personal vendetta. Do we have  
18 an instance -- I think in order -- what, perhaps, the  
19 plaintiffs are asking the Court to speculate on is that  
20 maybe the City -- they haven't alleged this, they haven't  
21 alleged a pattern of this happening and that the City is  
22 looking the other way.

23 The MOU is not -- I don't think Mr. Whittaker will  
24 stand here and say that the MOU is going to say that the  
25 County should divulge personal information to city officers



1 to help them with their personal matters; that's not common  
2 sense to look at it that way. It's the plaintiffs are the  
3 master of their complaint. They may have other claims, but  
4 they don't belong in federal court under Section 1983, Your  
5 Honor.

6 THE COURT: Okay. Thank you. I understand your  
7 argument.

8 Peggy -- I'm sorry. I want to introduce to you my law  
9 clerk, Peggy Fechtel, who has been with me way over  
10 20 years.

11 MS. FECHTEL: Thank you, Judge. Judge mentioned  
12 the *Morris* case. There was another more recent Supreme  
13 Court case, *Lindke*, L-I-N-D-K-E, 601 US 187. And I don't  
14 recall if the parties addressed that significantly, but it  
15 seems to me that it maybe tweaks *Morris* a little bit or it  
16 refocuses it when it talks about whether the conduct that  
17 caused disparity is traceable to the state's power or  
18 authority. And so if the Judge does allow plaintiffs to  
19 file the amended complaint and we go through this process  
20 again, I would just ask that the parties focus some of their  
21 discussion on that newer case.

22 MR. PAUL: Thank you.

23 MR. WHITTAKER: Thank you.

24 MR. PAUL: May I respond to that, Your Honor?

25 THE COURT: Sure, of course.

1 MR. PAUL: Well, the starting point, you know, it's  
2 hard to imagine how plaintiffs' claims against the City  
3 could proceed without a complete overhaul, complete  
4 retraction of everything they've alleged to date. You know,  
5 I mean, did it start out as an investigation into Mr. Taylor  
6 on behalf of the City or Ms. Hooven? No, there was no  
7 ongoing investigation. There was nothing pursuant to any --  
8 you know, he wasn't trying to exercise his authority of  
9 office at all there. You know, in order to abuse your  
10 authority, you have to at least use it, and, here, from the  
11 outset, he said this is not part of any City investigation.  
12 And that's why it's like if the police officer went into a  
13 bank wearing the uniform and robbed the bank, is that  
14 putting them under a color of law; and, no, that's  
15 completely outside of any City interests. It's not pursuant  
16 to any City policy or any regulation. That's rogue. And  
17 this is what this officer did.

18 THE COURT: Yeah, I understand that. It's funny,  
19 under color of state law is a difficult concept, and I don't  
20 know if Mr. Hicks remembers -- I don't even know if you were  
21 in the office back then -- but I had a case where two  
22 on-duty city policeman -- you remember this?

23 MR. PAUL: Tough case, yeah.

24 THE COURT: The Madonna Bar, picked up a woman who  
25 was drunk, took her home and raped her, and the jury found

1       that City wasn't liable.

2               MR. PAUL: Yeah, and the City addresses that case  
3       in our reply. In fact, that case also stands for the  
4       proposition that this case should be dismissed.

5               THE COURT: I think Peggy told me that I was sort  
6       of overruled.

7               MR. PAUL: But that case -- if I remember right,  
8       there was testimony in that case that the City had a  
9       practice of having its officers take drunken bar patrons  
10      home, right? And so at least at this juncture, early  
11      juncture, the City was eventually dismissed. I believe  
12      during trial Your Honor dismissed us, you know. But in that  
13      case, once discovery unfolded and there was no City  
14      ratification or deliberate indifference to custom of this  
15      happening, so the City was out eventually.

16              But the standard -- the reason this case that we have  
17      here is, you know, there's no policy or custom alleged where  
18      the county is supposed to help city officers with their  
19      personal matters, and that's why we say the MOU is a red  
20      herring. And plaintiffs can amend the complaint, but  
21      they're stuck, I believe they're stuck with the sole purpose  
22      being what it was.

23              THE COURT: Thank you. Like I said, if it makes  
24      you feel any better, that was my first reaction. I'm not  
25      sure I'm right on the law.

1           Mr. Whittaker.

2           MR. WHITTAKER: Yes. Thank you, Your Honor. May  
3           it please the Court. The Court said -- observed in the  
4           *Linthicum* case that all that is required under Section 83 is  
5           that the official exercised power possessed by virtue of  
6           state law and made possible only by the wrongdoer clothed  
7           with the authorities.

8           THE COURT: That was it, *Linthicum*.

9           MR. WHITTAKER: Yes. And that is exactly what we  
10          allege in the complaint. We just discussed that earlier in  
11          the complaint. I can tell the Court, you know, which  
12          paragraph by paragraph we make these allegations.  
13          Paragraph 52 of the complaint says: But for his position as  
14          a police officer and the trust placed in him by the City of  
15          Cincinnati, Officer Hooven never could have coordinated with  
16          Ms. Paul to access the system and disseminate the  
17          information he learned to Ms. Hooven, his ex-wife.

18          And the City is telling the Court that there was no  
19          investigation, there was no inquiry into this. I don't know  
20          how the City can make that argument when Internal  
21          Investigation Services did investigate this very action,  
22          Citizens' Complaint Authority investigated this action,  
23          found culpability there. That's a City agency, you know,  
24          saying that Officer Hooven, you know, acting in his -- all  
25          but saying acting in his capacity as a police officer

1       breached the public trust. You know, the chief of police  
2       herself signed off on the exoneration of Officer Hooven. I  
3       don't know how the City can say that there was no -- I mean,  
4       I understand that the City is not getting into policy in its  
5       motion, but policy under -- acting under color of state law  
6       is intertwined here. If the chief of police herself is  
7       signing off on exoneration and writing a handwritten note in  
8       the top of the corner recommending further instruction or  
9       further discipline to Officer Hooven, I don't know how we  
10      can go any higher in authority to say that there is some  
11      sort of policy that the City is acting under or that the  
12      City was interested in or felt could have been violated, but  
13      maybe the investigation didn't get them there to reach the  
14      factual conclusion of some sort of liability. But these are  
15      all questions of fact.

16           You know, Mr. Paul is arguing a summary judgment  
17      standard. You know, I investigated, you know,  
18      12(b)(6) cases talking about under color of state law, and  
19      that questions arises when private actors -- when  
20      individuals are private actors trying to claim that their  
21      actions are fairly attributable to the state or, on the face  
22      of the complaint, there's no allegation of under color of  
23      state law at all. So that that's what 12(b)(6) would  
24      review.

25           You know, the fact -- you know, we don't have to prove

1 the case in the complaint. We just have to put the City and  
2 the parties on notice of what the allegations are, the facts  
3 underlying the complaint. We can't possibly have all of the  
4 facts in front of us while filing the complaint. The  
5 complaint is detailed and the complaint specifies that all  
6 of these actions from Officer Hooven arose because of his  
7 access to this system that he never could have gained access  
8 to but for his office as a police officer. Ms. Paul  
9 alleges, similarly, at all times she was helping a police  
10 officer. I think it's fair to assume, although I can't  
11 speak for Ms. Paul, that she would not be helping a private  
12 individual get access to information unless she thought she  
13 was relying on that person being a police officer and  
14 relying on a policy allowing her to give that information to  
15 a police officer.

16 So we intend to take Your Honor up on the opportunity  
17 to exercise our leave to amend the complaint to add  
18 allegations related to the MOU. It's not going to be a  
19 radical overhaul. We haven't learned -- you know, we  
20 haven't had any discovery yet, so we don't have any  
21 additional facts to allege except for what Ms. Paul has  
22 added in her counterclaim or cross-claim. So, you know,  
23 it's sort of bolstering the complaint rather than the  
24 complaint being dependent on the MOU.

25 We will, obviously, take Your Honor up on that, but we

1       feel that the standard is clearly met under cases in the  
2       Sixth Circuit and in the Supreme Court which make it clear  
3       that under acting under color of state law at this point in  
4       the pleading stage is properly pleaded in this situation.  
5       And if Your Honor has any questions, I'm happy to take them.

6               THE COURT: I was going to say, life was much  
7       easier before *Twombly*.

8               MR. WHITTAKER: People are still figuring out what  
9       *Twombly* actually means.

10              THE COURT: No. Peggy, anything you want to ask?

11              MS. FECHTEL: No. I think just procedure, assuming  
12       he files a new motion, I expect there to be another  
13       motion -- excuse me, assuming plaintiffs file a new  
14       complaint, I assume there will be another motion to dismiss.

15              THE COURT: Right.

16              MS. FECHTEL: I don't know if there's any way to  
17       tighten that up this round.

18              THE COURT: Yeah, I don't think there is,  
19       unfortunately.

20              Okay. Thank you, Mr. Whittaker, I understand what  
21       you're saying.

22              MR. WHITTAKER: Thank you, Judge.

23              THE COURT: Mr. Paul?

24              MR. PAUL: Thank you.

25              THE COURT: Oh, let me ask you this, Mr. Whittaker,

1       when will you file your amended complaint by?

2               MR. WHITTAKER:   Yes, Your Honor.

3               THE COURT:   You don't have to get back up.   I just  
4       need you to tell me how long you need.

5               MR. WHITTAKER:   I'm going to be out of town  
6       starting this Thursday.   I will file it before then.

7               THE COURT:   Oh, okay.   That's fine.

8               MR. WHITTAKER:   I want to get in front of Your  
9       Honor as soon as possible.   I don't want to delay.

10              THE COURT:   Great.   Thank you.

11              MR. PAUL:   *Twombly* matters, and if you turn to  
12       paragraph 52, right.

13              THE COURT:   Judge Barrett and I sort of refused to  
14       agree with *Twombly*, but --

15              MR. PAUL:   When I first started, it had just been  
16       on the books and there was some speculation, Your Honor, as  
17       to whether *Twombly* would -- you know, what kind of  
18       difference *Twombly* would make, but words matter.   If you  
19       look at paragraph 52 of plaintiffs' complaint where  
20       plaintiffs allege, but for his position as a police officer  
21       and the trust placed in him by the City of Cincinnati,  
22       Officer Hooven could never have coordinated SACWIS facts.  
23       Well, that is the -- if not the ultimate issue, because  
24       there's a lot more to prove to get to admissible liability  
25       besides color of law, besides constitution violation,



1       there's a lot more to prove, which plaintiffs haven't even  
2       alleged enough, but it's a threshold issue. But for his  
3       authority, would he have done that? So that's a conclusory  
4       allegation that the Court should not take as true.

5               And when we look at the complaint and we look at the  
6       allegations that are factual, they spell out in no uncertain  
7       terms that she did it as a personal favor to him. She said  
8       so. They say she said so. So 52 is not -- should not be  
9       credited as a factual allegation, paragraph 52, Your Honor.

10              Mr. Whittaker spoke about the exoneration of Officer  
11       Hooven. The charge that he was exonerated on was improper  
12       access to a law enforcement database. So when the City  
13       looked at that and they researched the Regional Crime  
14       Information Center database going back a year and they  
15       interviewed everybody who was involved in this dispute, this  
16       personal dispute, yeah, they verified exactly what the  
17       plaintiffs have alleged and admitted, conceded, in their  
18       pleadings, that no City law enforcement database was  
19       accessed.

20              And so if anything, that goes to how much of an uphill  
21       climb or impossible climb the plaintiffs would have even if  
22       they could show color of law because they don't have facts  
23       in there showing that the City was deliberately indifferent  
24       to a pattern or custom violation of this. They're not  
25       looking the other way when officers are accessing personal

1 information. So there's no -- there's so -- we would say  
2 that it's futile to amend the complaint, Your Honor. I  
3 don't see how that would be an efficient use of judicial  
4 resources and it would keep the City in a case long past its  
5 due point.

6 As to Ms. Paul's allegations, you know, this all just  
7 goes to show how much of a personal dispute this is between  
8 the parties involved. She may have -- she may be trying  
9 to -- she's arguing for indemnification for the count. She  
10 may be seeking to create a defense for herself as to why she  
11 allegedly disclosed access, you know, disclosed confidential  
12 information from the county database. As far as our motion  
13 goes, you know, no one is disputing it's her access to a  
14 county database that they're looking -- that the plaintiffs  
15 are concerned about, there's nothing here that suggests that  
16 the plaintiffs -- that Officer Hooven relied on his  
17 authority as a Cincinnati police officer to gain access  
18 through the City's law enforcement database, or to represent  
19 to anybody that there was a City investigation that  
20 warranted disclosure of such information that he himself  
21 said he wanted as leverage on his ex-wife's fiancée.

22 THE COURT: Thank you, thank you.

23 Peggy, any questions?

24 MR. PAUL: Oh, if I may address *Lindke*. I totally  
25 forgot to address *Lindke*. I'm sorry. If I may?

1 THE COURT: Sure.

2 MR. PAUL: I believe, I believe you're talking  
3 about the case where the City manager in Port Huron had a  
4 personal Facebook page. And if that's the case we're  
5 talking about, then, that case again doesn't help the  
6 plaintiffs here. That case held that -- holding there was  
7 that a public official who prevents somebody from commenting  
8 on an official social media page engages in state action  
9 only if the official possessed actual authority to speak on  
10 the state's behalf or purported to have authority speaking  
11 on social media posts.

12 Here, the officer is saying I'm not doing anything  
13 related to City business. You know, and anyone he's -- the  
14 plaintiffs allege in their own complaint that he would speak  
15 and vent about his animosity towards his ex-wife and his  
16 child custody dispute; that is not government business.

17 MR. WHITTAKER: Judge, if I may. He tells his  
18 ex-wife --

19 THE COURT: Wait, wait. Let Mr. Paul finish.

20 MR. WHITTAKER: I apologize.

21 MR. PAUL: Sorry. I don't know how that case helps  
22 plaintiffs in any way and I appreciate the --

23 MS. FECHTEL: I'm just asking you for standard of  
24 law. I understand the facts.

25 MR. PAUL: Sure.

1 MS. FECHTEL: But they have a standard of law that  
2 seems -- to me at least, arguably changes the focus a little  
3 bit and puts it much more where the authority to act comes  
4 from possibly more than intent. And, again, my point in  
5 raising it is only in that I don't believe either side did  
6 address it, and so I just urge you to help the Judge know  
7 how to read it. But, I mean, I don't know that it's so much  
8 the facts. Yeah, the facts are weird, and I believe that  
9 that's a Sixth Circuit case, but they do kind of go into  
10 what color of state law means and how you look at it, and I  
11 don't know if they were intending to do it, but it certainly  
12 jumped out at me in reading it.

13 MR. PAUL: The City appreciates the level of detail  
14 in the complaint giving personal details on a relationship.  
15 That kind of, you know, explains why she did it as a favor  
16 to him. I mean, he didn't come to her as saying this is  
17 part of an investigation. So I think that this takes it  
18 completely out of the ambit of how do you attribute this to  
19 the City when at the outset the both of them are  
20 acknowledging to each other, yeah, this is not a government  
21 purpose here. Yeah, sorry.

22 THE COURT: Anything else, Peggy?

23 MS. FECHTEL: No, ma'am.

24 THE COURT: Mr. Paul? Mr. Whittaker?

25 MR. WHITTAKER: Just very briefly, Your Honor. I

1 would just like to call the Court's attention to Paragraphs  
2 85 through 90 of the complaint when the plaintiffs allege  
3 exactly that the City was deliberately indifferent to the  
4 rights of Mr. Taylor and Ms. Hooven by failing to supervise  
5 Officer Hooven and properly investigate him, as evidenced by  
6 the top police official, the chief herself, exercising  
7 decision-making authority as to whether or not to sustain or  
8 exonerate Officer Hooven for his conduct. This despite the  
9 fact that he's on the Brady list already, and despite the  
10 fact that he's already been found --

11 THE COURT: He's on the what list?

12 MR. WHITTAKER: He's on the Brady list, Your Honor,  
13 for actions involving dishonesty with a DUI a few years ago.

14 MR. PAUL: Excuse me.

15 THE COURT: Yeah, it's all right.

16 MR. WHITTAKER: And the department sustained an act  
17 of finding of illegality in connection with that. So the  
18 allegations from Paragraphs 85 through 90 discuss that,  
19 discuss the City's deliberate indifference and the City's  
20 failure to supervise and investigate. Again, the City is  
21 still arguing evidence, facts, things that will be excellent  
22 discussions on summary judgment, but we're not there yet.  
23 So thank you, Your Honor.

24 THE COURT: Thank you, Mr. Whittaker.

25 Yeah, Mr. Paul, go ahead.

1 MR. PAUL: Sorry, Your Honor. Just on the PageID  
2 70 of Document 1, that's the exhibit to plaintiffs'  
3 complaint.

4 THE COURT: Where are you now?

5 MR. PAUL: Document 1, plaintiffs' complaint,  
6 PageID 70, there's a chart there and that's the Brady list  
7 where prosecutors are made aware of certain, you know,  
8 occurrences. But I'm not sure where Mr. Whittaker got  
9 dishonesty from. He was -- he had a minor misdemeanor, an  
10 OVI conviction, so that is -- now what plaintiffs need to  
11 do, if they want to show a pattern, is not that this  
12 particular officer had some unrelated conduct in the past,  
13 unrelated to this issue before the Court, they've got to  
14 show a pattern -- you know, do we need to show a different  
15 kind of pattern of conduct on behalf on the part of the  
16 City, whether it's ratification, policy and custom, or  
17 deliberate indifference. They only call it a pattern and  
18 custom of inaction, and they're only looking at how the City  
19 handled the complaint about Officer Hooven. That in and of  
20 itself does not get it to a municipal liability claim, even  
21 if you could prove state color of law. Thank you, Your  
22 Honor.

23 THE COURT: Thank you, Mr. Paul.

24 Where's the County fit into this, Mr. Friedmann?

25 MR. FRIEDMANN: Your Honor, we don't take a

1 position on either one of them. We're here just to observe  
2 today.

3 THE COURT: Okay, okay. All right.

4 Then, anything else for the good of the order here?

5 MR. PAUL: No, Your Honor, nothing.

6 MR. WHITTAKER: Nothing more from plaintiffs, Your  
7 Honor.

8 THE COURT: Okay. All right. Thank you. We  
9 will -- I will take a look again at these cases. And you're  
10 going to file your amended complaint by this week, end of  
11 this week, so I guess you'll have to file a new motion  
12 anyway.

13 MR. WHITTAKER: To clarify, Your Honor, leave is  
14 granted or I need to apply for leave?

15 THE COURT: No, no, leave is granted.

16 MR. WHITTAKER: Thank you, Your Honor.

17 THE COURT: I like to cut through the formalities.

18 MR. WHITTAKER: Very good.

19 THE COURT: This reminds me -- I hate to reminisce  
20 with you guys, but this reminds me -- were you here, Peggy?  
21 It was the professor at UC, he was a criminal law professor.

22 MS. FECHTEL: It was not my case.

23 THE COURT: Yeah. I had a case, he was a criminal  
24 law professor at UC. His wife was a lawyer. She was over  
25 at in Kentucky with the school over there. I don't know if

1       you guys remember this one.

2               MS. FISCHER: I do.

3               THE COURT: It was like being in domestic relations  
4 court for a week. I'll never forget that case as long as I  
5 live. The City had -- she complained that he had abused  
6 her, so the City issued a warrant for his arrest, so he sued  
7 the City. And he had already -- I think the City had -- I  
8 remember my old boss, Jim -- can't think of his last name --  
9 was the Clerk of Courts at the time, and they were just  
10 handing these things out without any discretion or review or  
11 anything. So the two of them duked it out in my courtroom  
12 for a week.

13              And I thought I'll never forget that because the whole  
14 time I thought to myself, I feel like I'm sitting in  
15 domestic relations court. They hated each other so much  
16 that when they exchanged the kids, the two little children,  
17 that he would leave them on the edge of the sidewalk right  
18 next to the street and she would come out and get them.  
19 That was as close as they got to each other.

20              MR. PAUL: I will say, Your Honor, that, you know,  
21 it's been nothing but collegial between counsel and at least  
22 we have that.

23              THE COURT: What was his name?

24              (Off-the-record discussion.)

25              THE COURT: Anything further from anyone?



1 MR. WHITTAKER: Nothing from plaintiffs, Your  
2 Honor.

3 THE COURT: Okay. Thank you all very much.

4 MR. PAUL: Thank you, Judge.

5 THE DEPUTY: All rise. Court is now adjourned.

6 (Proceedings concluded at 11:28 a.m.)

7 **C E R T I F I C A T E**

8 In accordance with 28 U.S.C. Section 753, I certify  
9 that the foregoing is a correct transcript of the record of  
10 proceedings in the above-entitled matter prepared from my  
11 stenotype notes and that the transcript page format is in  
12 accordance with the regulations of the Judicial Conference  
13 of the United States.

14 /s/ Lisa Conley Yungblut 09/16/2024  
15 LISA CONLEY YUNGBLUT, RDR, RMR, CRR, CRC DATE